

**STATE OF ILLINOIS  
ILLINOI COMMERCE COMMISSION**

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COMMONWEALTH EDISON COMPANY	)	
	)	
Petition to determine the applicability of Section 16-125(e) liability to events caused by the August 23, 2007 storm front.	)	Docket No. 07-0491
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**STAFF’S REPLY TO  
THE PEOPLE OF THE STATE OF ILLINOIS’ RESPONSE  
TO COMMONWEALTH EDISONS’ POST-HEARING INTIAL BRIEF**

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), by and through its attorneys, and pursuant to the schedule adopted by the Administrative Law Judge ("ALJ") on October 20, 2008, respectfully submits this Staff Reply to the People of the State of Illinois' ("AG") Response to Commonwealth Edison's ("ComEd") Post-Hearing Initial Brief.

Similar to Staff's Initial Brief (at 4), this Reply Brief only addresses the Weather Waiver Request, and Staff reserves its right to contest the Legal Liability Request should it become necessary to address that issue following the resolution of the Weather Waiver Request.<sup>1</sup>

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<sup>1</sup> ComEd's Verified Petition ("Petition") was filed on September 21, 2007, and seeks alternative relief. ComEd's request for a waiver of liability under Section 16-125(e)(1) for interruptions due to "unpreventable damage due to weather events or conditions" is referred to in this Reply as the "Weather Waiver Request." Petition at 2. ComEd's request for "a determination that none of the interruptions resulting from the August 23 weather damage subjected more than 30,000 ComEd customers to a continuous power interruption of four hours or more" will be referred to in this Reply as the "Legal Liability Determination Request." *Id.*

**I. Staff's Response To The AG's Argument That ComEd Is Not Entitled To A Weather Waiver**

First, Staff acknowledges and commends the AG's intense scrutiny of ComEd's filing and evidence regarding its Weather Waiver Request. Staff, however, respectfully disagrees with the AG's analysis of the evidence adduced in this proceeding and, consequently, the AG's conclusions on the Weather Waiver Request.

The AG breaks its argument up into four distinct sections in support of its conclusion that ComEd is not entitled to a Weather Waiver. First, the AG argues that "ComEd has not established that any of the customer interruptions in Appendix A [to the Petition] were caused by weather events." AG Response to ComEd IB, at 4. Second, the AG argues that "ComEd has not established that these interruptions were caused by unpreventable damage due to weather events or conditions." *Id.* Third, the AG contends that "ComEd's own evidence in this case establishes that there were more than 30,000 customers who suffered continuous power interruptions of four or more hours that were not caused by any weather event whatsoever." *Id.* Finally, the AG contends that "ComEd's testimony contains flaws and inconsistencies that prevent a finding that the Company is entitled to its waiver request." *Id.*, at 4-5. However, all four of the AG's arguments suffer from fundamental infirmities; such as applying an onerous, although undefined, standard of proof, a tendency to largely ignore record-evidence inconsistent with AG's position, and a tendency to ignore the context of a severe storm front in which the evidence occurred.

**A. ComEd Has Met The Preponderance Of Evidence Standard**

The AG correctly notes that ComEd has the burden of proof in this proceeding. AG Response to ComEd IB, at 4, 10-11. The AG, however, fails to articulate that the burden ComEd must shoulder is proof on each element of its case “by a preponderance of evidence,” the standard of proof that applies in any contested case conducted under the Illinois Administrative Procedure Act. See Staff Response to ComEd’s IB, at 7, *citing* 5 ILCS 100/10-15. As Staff pointed out in its response to ComEd’s IB, the Commission has previously found that the preponderance of the evidence standard “appears to be the appropriate standard in all contested cases[.]” *Id.*, *citing Illinois Commerce Commission on its Own Motion: Amendment of 83 Ill. Admin. Code Part 200*, ICC Docket No. 92-0024, 1992 Ill. PUC LEXIS 200 at 4, (Order, April 29, 1992). “A preponderance of the evidence is evidence that renders a fact more likely than not.” *People v. Urdiales*, 225 Ill. 2d 354, 430 (2007).

The undefined evidentiary standard the AG seeks to impose upon ComEd appears to go far beyond the preponderance of evidence standard and instead require certainty or some form of clear and convincing evidence. The AG’s argument appears to elevate the concept of direct evidence to a requirement that ComEd document each outage as it occurred – in real time -- to determine precisely what type of weather event caused each interruption. First, such a requirement is impractical. No utility can be expected to somehow observe every piece of equipment in its service territory every hour of the day so as to present direct evidence of what happened to every piece of equipment that is damaged. Even if it were somehow possible to monitor a utility system in this manner, it would be prohibitively expensive to do so. Thus, Staff is not sure how ComEd could adduce evidence sufficient to meet the AG’s evidentiary

requirements. The AG appears to be setting the standard of proof at a degree of high certainty or perhaps a standard of beyond a reasonable doubt. ComEd, however, needs only meet the preponderance of evidence standard.

A preponderance of evidence “is that amount that leads a trier of fact to find that the fact at issue is more probable than not.” See e.g., *In re K.O.*, 336 Ill. App. 3d 98, 107 (1st Dist. 2002). Moreover, it is long established that “[a]bsolute certainty is neither required nor expected to be proven in a civil case.” *May v. Belleville Enameling & Stamping Co.*, 247 Ill. App. 275, 279 (4<sup>th</sup> Dist. 1928). Further, “[f]acts may be proven either by direct or circumstantial evidence.” 18 ILP Evidence § 363; see also *Hiscott v. Peters*, 324 Ill. App. 3d 114, 124-125 (2d Dist. 2001) (Generally, any fact or issue may be proved by circumstantial as well as by direct evidence.). “Circumstantial evidence is the proof of certain facts and circumstances from which the [trier of fact] may infer other connected facts which usually and reasonably follow according to the common experience of mankind.” *Hartness v. Ruzich*, 155 Ill. App. 3d 878, 882 (5<sup>th</sup> Dist. 1987). “The sole limitation on the use of circumstantial evidence is that the inferences drawn there from must be reasonable.” *Id.* at 883.

The AG, however, imposes a different, more onerous, and clearly erroneous standard. For example, it contends that there is “no reasonable basis upon which the Commission could grant” ComEd’s weather waiver request because ComEd witness Mr. Segneri testified that he was not sure of each and every outage, but that “certainly 90 percent plus” of the outages contained in the updated Appendix A were due to unpreventable weather conditions. AG Response to ComEd IB, at 6. Likewise, the AG points out that ComEd witness Mr. Segneri testified that although 100 mile per hours

winds occurred within the storm front, he doubted there was 100 mile per hour winds everywhere within ComEd's territory. Based on this testimony, the AG criticizes ComEd for not having provided evidence of precisely which of the 639,176 customers in Appendix A were affected by" the 100 mile per hour wind gusts. The AG offers no suggestions on how this could be done. One way, it could presumably be done, would be to have trained ComEd personnel on site at each and every location of these 639,176 customers recording wind speeds. ComEd, however, would have no way of knowing which of its 3 million plus customer base would experience these wind gust prior to it occurring, which would then logically require blanket monitoring of the entire distribution system and all ComEd customer locations, twenty-four seven. Nonetheless, this approach would appear to be prohibitively cumbersome and expensive. The AG's standard, although undefined, appears to imply a strict standard of evidence requiring a degree of high certitude, far beyond the requirements of the applicable preponderance of the evidence standard of proof.

Finally, although the AG argues that ComEd "appl[ies] its own more relaxed internal standards," the AG not does not identify or define either the "relaxed ComEd standards or the more stringent standard that the AG implies ComEd should meet, leaving the reader and the trier of fact to speculate as to what standard the AG is applying. AG Response to ComEd IB, at 6, 7.

More specifically, as Staff pointed out in its Response to ComEd's IB (at 7-8), the general question presented by a Weather Waiver Request is whether the power interruptions for which a waiver is sought were the result of unpreventable damage due to weather events or conditions. While the specific facts needed to answer this question

will vary from case to case and depend on the particular circumstances of each waiver request, Staff submits that there are several key elements that must be established in each case. First, the design, construction and maintenance of the plant involved in the power interruptions must be established. That is, the utility must establish that the plant involved in the power interruptions was adequately designed, constructed and maintained. Second, the weather events that occurred in the portions of the utility's service territory experiencing power interruptions must be established. Specifically, it must be shown that weather conditions or events occurred and exceeded the standards to which the utility's system was appropriately designed and built. Third, information regarding the particular interruptions at issue must be provided to establish a causal relationship or nexus between the weather events or conditions discussed above and the damage to plant resulting in the power interruptions. Finally, information on the utility's restoration effort should be provided to establish that the restoration effort was reasonable and did not contribute to the number or length of interruptions. *Id.* Such proof reasonably and logically leads to the conclusion, absent contrary convincing evidence, that such interruptions are due to unpreventable damage from weather events or conditions.

Ironically, in light of the AG's contention that ComEd has failed to demonstrate that any of the outages were due to unpreventable weather, both Staff witness Mr. Linkenback and AG witness Mr. Lanzalotta both agreed on most of the above key elements. For example, Staff witness Mr. Linkenback testimony concluded that ComEd provided meteorological warnings and other data as evidence of the severity of the storms." ICC Staff Ex. 1.0 (Linkenback Dir.), at 7-8. AG witness Mr. Lanzalotta testified

that he had “no basis for questioning the severity of the storm” as described by ComEd. Tr. 103; lines 9-11. Staff witness Mr. Linkenback testified that the Commission’s Rule 305 adopts the National Electrical Safety Code (“NESC”) as the design standard that ComEd is required to meet regarding its distribution facilities. ICC Staff Ex. 1.0 (Linkenback Dir.), at 9. Mr. Linkenback also testified that “weather conditions exceeded reasonable design standards for distribution facilities during storms.” *Id.* AG witness Mr. Lanzalotta testified that the NESC standard does not have an age limit on poles, or pole replacement, and likewise for cross-arms, this despite his argument that certain ComEd distribution facilities were aged. He also testified that nothing in the NESC standards require an overhead distribution facility to withstand impacts from falling trees or tree branches. Tr. 107, lines 3- 20. Finally, Mr. Lanzalotta acknowledged that other than his views on the age of cross-arms, he was not offering any evidence on “what could or should have been provided to establish whether there was unpreventable weather damage.”

**B. The AG’s Arguments Appear to Ignore Relevant Evidence**

The AG argues that ComEd has not established that the outages that occurred after the storm front moved out of the area were caused by weather events or conditions. To the contrary, ComEd witness Segneri explained that storm events often cause conditions – such as a broken or dangling tree limb or cross arm or an underground cable with a hole caused by lightning – that result in an outage hours or days after the storm event. Tr. at .229-230. While the AG is correct to question the timing of the outages, the record in this docket explains the outages that occurred in the hours and days immediately after the storm event.

The AG also makes an argument based on ComEd not including a “cause” column in its Appendix A for each outage. AG IB, p. 8. While it may have been more complete to do so, such information was not specifically requested and ComEd did provide summary data regarding the causes. ComEd Ex. 1.02, p. 24; Tr. at 209-210. Thus, the instant record does support ComEd’s claim of interruptions caused by unpreventable damage from weather events or conditions.

The AG also argues with respect to ComEd Ex. 1.02 that intentional outages are not weather related. AG IB at 11-12. The evidence is to the contrary. First, the cause detail in the table reproduced in the AG’s Response Brief indicates that the cause detail is “Emergency Repairs”. If it becomes necessary to de-energize a portion of an electric distribution system to make repairs caused by weather events or conditions, then the resulting interruptions are caused by the storm. Indeed, the AG’s witness acknowledged that that intentional interruptions can be caused by the need to make repairs caused by weather conditions. Tr. at 138.

## **Conclusion**

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully states that it has no objection to the Commission granting ComEd a Section 16-125(e)(1) weather waiver consistent with the positions articulated above, in its Response to ComEd’s IB, and in ICC Staff Exhibits 1.0 and 2.0 (Direct and Cross-Response Testimony of Ron Linkenback).



Respectfully submitted,

/s/

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